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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 110

ERICK RIOS BRIDOUX, *Petitioner*,

v.

EASTERN AIR LINES, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the District of Columbia Circuit refusing to revive and reinstate the defendant's counterclaim, entered in the above-entitled case on February 11, 1954.

Opinions Below

The United States District Court for the District of Columbia did not render an opinion in this cause. The opinion of the United States Court of Appeals for the District of Columbia Circuit is set forth on pages 26-30 of the record.

Jurisdiction

The judgment of the Court of Appeals was entered on February 11, 1954. (R. 34) A petition for rehearing filed on February 26, 1954 (R. 35) was denied on March 5, 1954 (R. 39). The jurisdiction of this Court is invoked under 28 U. S. C., #1254 (1).

Question Presented

Whether a court can *grant* relief from a default to a defendant and *deny* relief from a default to a plaintiff in a single factual situation pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

Statute Involved

Rule 60(b) of the Federal Rules of Civil Procedure.

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; * * * or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *"

Statement

The petitioner, Captain Erick Rios Bridoux, is a citizen of the Republic of Bolivia and was Director General of Civil Aeronautics for Bolivia in 1949 when he came to the District of Columbia to study under the Civil Aeronautics Administration. On November 1, 1949, while serving with the Bolivian Army Purchasing Commission, the petitioner piloted a certain Bolivian P-38 aircraft near Washington National Airport. The P-38 was struck in mid-air by a DC-4 aircraft operated by the respondent, Eastern Air Lines, Inc. All of the passengers and crew carried in the Eastern plane were killed and the petitioner was the sole survivor of the collision.

Respondent filed a complaint for damages against petitioner in the United States District Court for the District of Columbia in 1949. Petitioner answered denying liability and filed a counter-claim through counsel. Petitioner, an alien, departed from the United States in July, 1950, because he was without funds (R. 10) and did not return until December, 1952.

Four months after petitioner's departure from the United States, and without his knowledge, the attorneys who represented him in the action filed a Motion for Leave to Withdraw as his attorneys (R. 6). The Motion and supporting Points and Authorities (R. 7) state that petitioner's address was unknown to them, but the certificate of service (R. 8) indicates that it was served on petitioner at an address in Washington, D. C. where the attorneys knew he had not resided for several months. The trial court, however, granted the motion and an order granting the said attorneys Leave to Withdraw was entered (R. 8).

A few weeks before the pre-trial of this case in June of 1952 notices were again mailed to petitioner's District of Columbia address that the record indicated had not been used for approximately two years, but no effort was made to contact him in Bolivia. When petitioner did not appear and was not represented at the said pre-trial, respondent moved for a default and the same was granted together with the dismissal of petitioner's counterclaim.

Petitioner returned to the District of Columbia in December of 1952 and within a few days obtained counsel who filed a Motion to set aside the defaults on January 2, 1953 (R. 9). The trial court, after argument, denied the Motion and overruled a Motion to Reconsider (R. 19).

On appeal the Court of Appeals found: (1) that petitioner never received actual notice of the withdrawal of his counsel or of any proceedings leading to the default judgment and dismissal of his counterclaim until after they had been entered (R. 27), (2) that it was not unnatural for petitioner to leave the United States (R. 29)

and (3) that it could not be said definitely that the case would be reached for trial within the time which actually expired before his return, when, through new counsel, he promptly moved that the default be set aside and the counter-claim reinstated (R. 29).

On the basis of its findings, the Court of Appeals held that the District Court abused its discretion in failing to set aside the default judgment against petitioner but that "[petitioner's] lack of diligence in respect to his counter-claim might appropriately be made to bear some of the consequences of his default." (R. 30) On that basis the Court of Appeals affirmed the dismissal of petitioner's counter-claim. A Petition for Rehearing (R. 35-38) was denied by Order of the Court of Appeals entered March 5, 1954 (R. 39).

Specification of Errors

The United States Court of Appeals for the District of Columbia Circuit erred:

1. In holding that the petitioner had a different right to relief as a defendant than he did as a plaintiff under Rule 60 (b) of F. R. C. P.

2. In failing to hold that it was an abuse of discretion for the District Court to fail to revive and reinstate the counter-claim.

3. In affirming the portion of the order of the District Court refusing to revive and reinstate the petitioner's counter-claim.

4. In affirming the District Court with respect to petitioner's counter-claim on the ground that "[Petitioner's] *lack of diligence* in respect to his counter-claim might appropriately be made to *bear some of the consequences of his default.*" (Emphasis supplied.)

Reasons For Granting The Writ

1. The question presented is of importance in the application of Rule 60 (b) of the Federal Rules of Civil Procedure. Its settlement by this Court is plainly in the Public Interest, since Rule 60 (b) has been the subject of extensive and continuing litigation, much of which will be in doubt until this question is resolved.

2. The Court of Appeals has given a novel and important interpretation to Rule 60 (b) on the basis of inadequate reasoning. The Court of Appeals found that it *was* an abuse of discretion to refuse to set aside the default judgment in the factual circumstances of the present case, but that it *was not* an abuse of discretion to refuse to reinstate the counter-claim.

The only basis for the court's distinction is the following sentence:

> "[Petitioner's] lack of diligence in respect to his counterclaim might appropriately be made to bear some of the consequences of his default."

Clearly, *lack of diligence bearing consequences of default* is not an adequate basis upon which to determine that Rule 60 (b) should be more harshly construed with respect to counter-claimants or plaintiffs than with respect to defendants. If such a distinction does exist, this Court should clarify that fact for all courts and all litigants. If it does not, the decision below of the United States Court of Appeals for the District of Columbia Circuit should not be permitted to stand as a precedent on this important question.

3. The decision of the Court of Appeals has the effect of holding that a plaintiff is less entitled to his "day in court" than is a defendant. It thereby creates a distinction which is novel with respect to all decided cases under Rule 60 (b) which the petitioner has, with due diligence, been able to discover.

Rule 60 (b), by its terms, is made applicable to any "final judgment, order, or proceeding." The courts have not questioned its applicability to the setting aside of default judgments (specifically covered by Rule 55 (b)) or dismissals.

Tozer v. *Charles A. Krause Milling Co.*, 189 F. 2d 242 (C.A. 3) 1951.
Bushey v. *U. S.*, 109 F. Supp. 427 (U.S. Ct. Cl.) 1953.[1]
Nelms v. *Baltimore & Ohio R. Co.*, 11 F. R. D. 441 (D.C. E.D. Ohio) 1951.

Nor was there any question of applicability in the decision of the Court of Appeals in the present case.

Rule 60 (b) has been frequently construed by our Courts and without exception has been given a most liberal construction.

Klapprott v. *U. S.*, 335 U.S. 601, 69 S. Ct. 384.
U. S. v. *Karahalicis*, 205 F. 2d 331 (C.A. 2)
U. S. v. *Backofen*, 176 F. 2d 263 (C.A. 3)
Ellington v. *Milne*, 14 F. R. D. 241 (D.C., E.D. N.C.)

The reason for such liberal interpretation was set forth by the Third Circuit in *Tozer* v. *Charles A. Krause Milling Co., supra*, where the court said (189 F. 2d 242, 245):

> "The recent cases applying Rule 60(b) have uniformally held that it must be given a liberal construction. * * * Any doubt should be resolved in favor of the petition to set aside the judgment so that cases may be decided on their merits. (citing cases) Since the interests of justice are best served by a trial on the merits, only after a careful study of all relevant considerations should courts refuse to open default judgments. We are of the opinion that the Court below applied a standard of strictness rather than one of liberality in concluding that justice did not require that the judgment be set aside."

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[1] Construing Rule 54(b) of the Court of Claims, which is substantially identical with Federal Rule 60(b).

This same position is taken in *Barron and Holtzoff*, 3 Federal Practice and Procedure, Rules Edition, Section 1323, page 253, which states:

> "The discretion should ordinarily incline towards granting rather than denying relief, especially if no intervening rights have attached in reliance upon the judgment and no actual injustice will ensue."

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRAINARD H. WARNER III
Attorney for Petitioner

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OPINIONS BELOW

The opinion of the United States Court of Appeals of the District of Columbia Circuit is set forth at pages 21 to 25 of the record and at — Fed. 2nd — and — U.S. App. D.C. —. There was no opinion in the United States District Court for the District of Columbia.

JURISDICTION

The judgment of the Court of Appeals was entered on February 11, 1954 (R. 26). A petition for re-hearing filed on February 26, 1954 (R. 27) was denied on March

5, 1954 (R. 31). The petition invokes the jurisdiction of this court under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether it was an abuse of discretion under Rule 60(b) to refuse to vacate a default judgment dismissing petitioner's counter-claim.

STATUTE INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure for the United States District Courts, the pertinent parts of which are set forth on page 2 of the petition herein.

STATEMENT

On November 1, 1949 petitioner, Director General of Civil Aeronautics for Bolivia, was flying a P-38 fighter plane owned by the Bolivian Government in the vicinity of the Washington National Airport when he came into collision with an Eastern Air Lines DC-4 passenger transport plane, as a result of which all the passengers and crew on the transport plane were killed. Petitioner was the sole survivor. On January 30, 1950 respondent brought suit against the petitioner in the United States District Court for the District of Columbia to recover for the value of the hull of the DC-4 (R. 2), and petitioner answered the complaint on May 1, 1950 (R. 4), including in his answer a counter-claim in which damages for personal injuries were claimed in the sum of $300,000 (R. 4-5). Respondent duly replied to the counter-claim (R. 5). Petitioner was represented by Mr. Frederick A. Thuee and Mr. Gerald P. O'Grady of the District of Columbia bar who had been retained to act upon his behalf by the

Bolivian Ambassador (R. 7). Thereafter and on July 25, 1950 petitioner left the United States and returned to Bolivia (R. 7). He left no forwarding address and at no time did he communicate with his counsel or with the court. On November 14, 1950 Messrs. Thuee and O'Grady filed a motion in the United States District Court for leave to withdraw from the case upon the following four grounds:

1. Petitioner's departure from the United States for Bolivia the previous July.
2. His address in Bolivia was unknown, and he had failed to contact his counsel.
3. Neither Petitioner, nor any one on his behalf had evinced any interest nor cooperated in the action, and
4. He had failed to pay his counsel.

The motion was served upon petitioner by mailing a copy thereof to his last known address in the United States (R. 8). On December 1, 1950 an order was entered permitting Messrs. Thuee and O'Grady to withdraw as attorneys for petitioner (R. 8). Subsequently and in June 1952, approximately two weeks in advance of the pre-trial hearing of this case, petitioner was notified of the pre-trial hearing by a letter sent to him at his last known address (R. 14-15), as well as by a similar letter sent to the Bolivian Ambassador (R. 15-16). Petitioner failed to appear at the pre-trial hearing, either in person or by an attorney, and accordingly an order was entered on June 27, 1952 directing the entry of judgment against the petitioner by default (R. 8-9); and judgment was entered in the sum of $160,000 (the value of the respondent's airplane) on July 29, 1952 (R. 9).

Petitioner heard of the entry of this judgment during the summer of 1952 (R. 13). He made no effort to com-

municate with the court or with counsel; nor did he ever advise the court or counsel where he could be reached in Bolivia (R. 13). He returned to this country in December 1952, and on January 2, 1953 a motion was made to vacate the default judgment and to reinstate his counter-claim (R. 9). The grounds upon which the application to vacate was made appear in a brief affidavit, made by the petitioner, printed at page 10 of the record, viz, that petitioner left the United States in the summer of 1950 because he was without funds; that subsequently he requested the Bolivian Government to appropriate funds so that he could retain counsel but that request was not granted; and from the time he left the United States in the summer of 1950 until his return in December 1952 he did not communicate with anyone concerning this suit, its defense or its counter-claim.

After full consideration and reconsideration the motion to vacate was denied by the District Court (R. 19). The United States Court of Appeals for the District of Columbia Circuit reviewed the discretion exercised by the District Court and said that under the circumstances appearing in the record "it was improvident not to grant *any relief* whatever from this very large money judgment entered by default", *especially* when under the provisions of Rule 60(b) "relief may be granted upon just terms". The Court of Appeals went on to say that "just terms are available here in connection with Bridoux's counter-claim". The Court of Appeals then exercised a wise and informed discretion by reversing the District Court in part, viz, by opening the default with respect to the $160,000 money judgment, and affirming the District Court in so far as the dismissal of the counter-claim was concerned, and approving "the District Court's exercise of discretion in refusing to vacate its dismissal" (R. 25).

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals for the District of Columbia Circuit presents no grounds for the granting of a writ of certiorari.

The only question involved below was one of judicial discretion. No novel, important or unusual question of law was decided. No conflict exists between the decision of the United States Court of Appeals for the District of Columbia and the Court of Appeals of any other circuit. The decision below is not in conflict with any applicable decision of this court; nor has the Court of Appeals for the District of Columbia Circuit departed from the accepted and usual course of judicial proceedings, nor sanctions such a departure by a lower court.

So far as is pertinent here Rule 60(b) states that "upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding" for mistake, excusable neglect, or for any other reason justifying relief from the operation of the judgment. Acting upon the authority conferred by this rule the Court of Appeals has opened a $160,000 default judgment against petitioner, *upon the terms* that the dismissal of his counter-claim be sustained. There can be nothing arbitrary about such a decision. Inherent in it is a manifestly careful appraisal of the record, the conduct of the parties, and the responsibilities and duties resting upon litigants generally. The Court of Appeals is careful to point out that one who takes the initiative in a law suit has responsibility and obligation to the court, and petitioner's "lack of diligence in respect to his counterclaim might appropriately be made to bear some of the consequences of his default". The unchallenged record and petitioner's own admissions establish that petitioner left the country and did not contact the court or his counsel for 29 months.

During that time his whereabouts were completely unknown. Respondent submitted in the courts below that petitioner had, to all intents and purposes, abandoned all phases of this law suit, both defense and counter-claim. When he left the country in 1950 he was not only the defendant in a law suit accusing him of culpability for his aircraft accident in which large damages were claimed, but he was also the claimant in a counter-claim in which the ad damnum was $300,000. Petitioner's affidavit did not tell the court where he went. It did not tell the court that he left any forwarding address. It did not tell the court that he was ignorant of the address of his own attorneys, nor that he was prevented by accident, illness or other reasons from communicating with them. In fact the only permissible inference from this record is that petitioner deliberately and intentionally moved out of the country without leaving any forwarding address and abandoned the law suit in which he was a defendant and counter-claimant.

Petitioner's moving affidavit (R. 10) makes it abundantly clear that when he left the United States in the summer of 1950 he knew that his then attorneys intended to withdraw. It admits they told him of their dissatisfaction and the non payment of their fees. It was in consequence of this knowledge that he, as he alleges, requested funds of his government with which to retain counsel. He would not make such request unless he knew his lawyers had withdrawn. Nevertheless petitioner abandoned the law suit and kept his whereabouts secret for some 29 months —advising neither court nor counsel where he could be reached, and ignoring all authority of the court which had proper jurisdiction over his person.

Respondent readily agrees that Rule 60(b) should receive a liberal interpretation. There is no quarrel with the cases to this effect cited in the opinion below and in

the petition under consideration. None of these presents any factual similarity with the case at bar. The question here is simply whether, under the facts and circumstances shown in this record, "there has been an abuse of discretion and (that question) is to be determined in accordance with familiar principles governing the exercise of judicial discretion" *Burns* v. *U.S.* 287 U.S. 216 77 L. Ed. 266. Obviously the "familiar principles governing the exercise of judicial discretion" do not constitute a novel, unusual and important question calling for the granting of a writ of certiorari in this case. Those principles are the same whether applied to the granting or withholding of relief under Rule 60(b) as they are when applied to any other situation appropriate to their use. The principles remain the same. Their application requires "conscientious judgment, not arbitrary action". While respondent disagrees with the decision of the Court of Appeals in so far as it reversed the District Court in part, a mere reading of that decision immediately demonstrates that it was not "arbitrary". On the contrary it was a conscientious, careful and fair disposition which weighed all factors involved and balanced the two parts of the default judgment, one against the other, and gave petitioner substantial relief "upon such terms as were just" [Rule 60(b)].

Petitioner states, incorrectly, that the question involved here is one that will cast doubt on the application of Rule 60(b), and cites no authority to support such a position. Nor is petitioner correct when he states that the lower court has attempted to draw a distinction with respect to plaintiffs and defendants. What the lower court has done is to reach a fair decision in the light of the circumstances which existed. Again petitioner has cited no authority to support this claim.

Petitioner states, incorrectly respondent believes, that the Court of Appeals decision creates a novel distinction

between plaintiffs and defendants in the application of Rule 60(b). Clearly it does nothing of the kind. It merely takes cognizance of the responsibilities resting on parties litigant, and weighs those considerations against the background of the whole record for the purpose of exercising a sound and informed judicial discretion which is fair and just to all parties. Rule 60(b) is not a slide rule to be applied mechanically but it is to be applied "upon such terms as are just" to any situation "justifying relief from the operation of the judgment".

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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